No. 87-1424

In The

Supreme Court of the United States

October Term, 1987

COMMONWEALTH OF VIRGINIA, *ex rel.* STATE BOARD OF ELECTIONS,

Petitioner,

v

WILLIE B. KILGORE, DORIS McCONNELL, PATSY BURCHETT, KATHERINE JONES McCLELLAND, FAY OWENS, ROGER ADAMS, EVELYN BACON, PHILLIP CHEEK, the COUNTY OF LEE, VIRGINIA, the COUNTY OF SCOTT, VIRGINIA, the REPUBLIC INSURANCE COMPANY and the COMPASS INSURANCE COMPANY,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether this Court should decline to review the construction of a state statute agreed upon by both lower courts, where the validity of the statute is not in question, but only its applicability to the unique facts of this case?

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Respondents Republic Insurance Company and Scott County respectfully oppose the Commonwealth of Virginia's Petition to this Court for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit for the following reasons.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent constitutional provisions and the state statutes at issue here are reproduced in the text herein or in the Brief of Petitioner.

STATEMENT OF THE CASE

Additional material facts are omitted from the Statement of the Case contained in the Brief of Petitioner and are included herein.

Virginia law directs that members of electoral boards in counties shall be appointed by state judges of the state judicial circuit in such counties and that the majority of members of the electoral boards in the counties shall be from the same political party which elected the governor for the Commonwealth in the last gubernatorial election. Va. Code §24.1-29. Virginia law provides no local input to state judges in the selection of members to the electoral boards in counties.

Thus, with the election of a Democratic governor in 1982, state judges appointed electoral boards in Scott County, in Lee County and throughout the Commonwealth comprised of a Democratic majority. As a consequence of these appointments, disputes arose in Scott County and Lee County between the incoming and outgoing electoral boards as to which had the authority to appoint their respective general registrars.

In response to the Scott County and Lee County disputes, instructions were given by the State Board of Elections to the newly appointed members of the electoral boards in the counties of Scott and Lee with

regard to the appointment of the general registrars in these counties. Due to competing appointments to the positions, the State Board of Elections immediately instituted and proceeded to conclusion suits in state court in Scott County and in Lee County to determine which appointees lawfully held office. Throughout the disputes, additional instructions were given by the State Board of Elections to the electoral boards in these counties, including, among other things, the selection of the assistant registrar in Lee County. Without exception, the instructions of the State Board of Elections were followed by the electoral boards in these counties.

Upon the filing of suit by Willie Kilgore, outgoing Scott County general registrar, under 42 U.S.C. §1983, neither the Commonwealth's insurer, Compass Insurance, nor Scott County's insurer, Republic Insurance, afforded a defense for the electoral board members, each denying coverage under its policy. As a result of this position by the insurers, a declaratory judgment action was filed in District Court, initially naming Republic Insurance as a defendant and subsequently naming Compass Insurance as an additional defendant. The District Court found that the electoral board members and the general registrar were arms of the state, that the Republic Insurance policy did not and was never intended to cover electoral board members or the general registrar, and that the Compass Insurance policy covered electoral board members and general registrars under its definition of "Insured." (A-65-68) On appeal to the Fourth Circuit, the Court of Appeals affirmed the District Court opinion, agreeing that all measurable aspects of the operation of the county electoral boards, including the appointment,

training, discharge, compensation, duties and policies of the electoral boards were governed and determined by state law and not by any officials elected by the county nor by any officials appointed by the county. (A-17-19) The opinions of the District Court and the Court of Appeals followed the traditional principles of employer-employee law of Virginia and the Virginia decisional law and general statutory scheme governing registrars and electoral boards. (A-17-19; 60-64)

REASONS FOR DENYING THE WRIT

THIS IS NOT THE RARE AND EXCEPTIONAL CASE IN WHICH THIS COURT SHOULD REVIEW A CONSTRUCTION OF STATE LAW AGREED UPON BY THE TWO LOWER FEDERAL COURTS, ESPECIALLY WHEN THE LOWER COURTS' INTERPRETATION OF THE STATUTE IS REASONABLE.

Two lower federal courts have interpreted former Va. Code §24.1-32 (1985) and both have concluded that under the statute, registrars and local electoral board members were employees of the Commonwealth of Virginia and not of the counties they serve. Both courts gave ample reasons for their respective determinations. *See* Brief of Petitioner, A-14 to A-19 and A-59 to A-64.

As a matter of policy and practice, this Court will "[n]ormally . . . defer to the construction of a state statute given it by the lower federal courts." *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 499 (1985) (citations omitted). The Court does so

> not only to "render unnecessary review of their decisions in this respect," *Cort* v. *Ash*, 422 U.S. 66, 73 n.6, 45 L.Ed.2d 26, 95 S.Ct. 2080 (1975), but also to reflect our belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States.

Brockett, 472 U.S. at 500. Further, as most recently confirmed in *Virginia* v. *American Booksellers Association, Inc.*, 484 U.S. , 108 S.Ct. 636, 643 (1988), "[t]his Court rarely reviews a construction of state law agreed upon by the two lower federal courts."

Petitioner asserts as the court of appeals' "clear error"[1] its failure to follow: (1) one sentence in a 1975 district court case, (2) opinions from the Attorney General of Virginia and (3) a 1986 amendment to the statute in question. However, none of the purported authorities are contrary to the lower courts' construction of the statute under review.

First, the district court case cited by Petitioner, *Hardy v. Board of Supervisors of Dinwiddie County*, 387 F. Supp. 1252 (E.D. Va. 1975) is not as clear as Petitioner would have this Court believe. The district court in *Hardy* was ruling upon an unopposed motion to dismiss for lack of subject matter jurisdiction pursuant to F.R.Civ.P. 12(b)(1). The court, without any reasoning therefore or reference to any authority, stated in *dicta* that "[t]he Board of Supervisors of Dinwiddie County and the Electoral Board of Dinwiddie County are, without doubt, local officials and not officers of the State." *Hardy*, 387 F. Supp. at 1255. The context of the ruling was whether a three-judge court had to be convened pursuant to former 22 U.S.C. §2281.[2] The lower courts could hardly be faulted for "ignoring" this case.

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[1] This Court "will defer to lower courts on state-law issues unless there is 'plain' error, . . . the view of the lower court is 'clearly wrong,' . . . or the construction is clearly erroneous . . . or 'unreasonable.' " *Brockett*, 472 U.S. at 500 n.9 (citations omitted).

[2] Title 22 U.S.C. §2281 was repealed in 1976.

Second, this Court has held recently that the interpretation of a state law by the Attorney General of Virginia is not binding on Virginia state courts. Thus, neither this Court nor the lower courts may accept the Attorney General's interpretation of the statute in question as authoritative. *American Bookseller's Association*, 108 S.Ct. at 644.[3]

Even if this Court were to accept an Attorney General letter-opinion as authoritative, there is only one such opinion which fully analyzes the surrounding facts. Like the lower courts here, the Attorney General of Virginia examined the appointment of electoral boards, their functions and duties and their relationship to the State Board of Elections. This analysis led the Attorney General to conclude, as did the lower courts in the instant case, that local election board

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[3] In any event, the court below considered the Attorney General's "official opinions." As the State Attorney General noted in an opinion arising out of these proceedings:

> There is no firm rule expressed in the cases by which one may, with confidence, determine in every situation that a particular public officer or employee is a State or local government official, and, in fact, each such determination tends to be controlled by the context in which the question is presented . . . There are no cases of which I am aware in which a court has declared county election officials to be either State or local officers . . . .

1982-83 Report of the Attorney General, at 225, cited in part in Brief of Petitioner, p. A-15. Thus, the opinion of the Attorney General implicitly recognizes the court of appeals' "nexus" test by conceding that one must examine the context in which the case arises in order to determine whether an individual is a State or local official.

members are State officials. That Attorney General Opinion states, in pertinent part, as follows:

> Members of the local Electoral Board are constitutional officers appointed by State Courts for the purpose of performing certain duties in connection with elections. They exercise an important function of the State government, affecting not only the county in which their duties are performed, but the State as a whole. This is emphasized by the enactment of Section 24-25 of the Code by which the legislature imposed upon the State Board of Elections the duty of supervision and co-ordinating the work of the local Electoral Board and empowered it to make such rules and regulations as are conducive to the proper functioning of such Electoral Boards. Furthermore, the State Board of Elections is authorized to institute proceedings for the removal of any member of an Electoral Board who fails to discharge his duty . . . .
>
> I am of the opinion, therefore, that since the maintenance of local Electoral Boards is a State function and its members are appointed for a statewide purpose, they must be considered State officers.

1949-50 Report of the Attorney General, at 69.

Finally, the Court of Appeals rejected Petitioner's argument that the 1986 amendment to Va. Code §24.1-32 constituted a "legislative interpretation of the prior statute." (A-15) The Court further noted that the amendment did not become effective until July 1, 1986

"long after the institution and trial of these actions." (A-15)[4]

In the very chapter (558) of the 1986 laws which amended §24.1-32, the General Assembly expressly accepted full responsibility, on behalf of the Commonwealth of Virginia, for actions taken by members of a local electoral board. In 1986, the Virginia General Assembly simultaneously enacted §2.1-526.8(E) which established a *state* public official's liability insurance plan which specifically included *local* electoral board members and general registrars. Section 2.1-526.8(E) states as follows:

> The insurance plan established pursuant to this section shall provide protection against professional liability imposed by law for damages resulting from any claim made against a local electoral board, electoral board member or general registrar for acts or omissions of any nature while acting in an authorized governmental or proprietary capacity and in the course and scope of employment or authorization, subject to the limitations of such insurance plan.

This professional liability insurance coverage plan established by the State for these officials certainly belies the proposition that these employees are merely local officials for whose actions the State is not responsible. The Commonwealth's argument that the 1986

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[4] There is absolutely no evidence in the record, nor is any authority cited for Petitioner's proposition, that the amendment was enacted "in response to this litigation." Brief of Petitioner at 12. If the General Assembly of Virginia wanted to make local electoral board members local officials, they could have done so expressly.

amendment to §24.1-32 is proof that the Commonwealth is not willing to accept the responsibility for the conduct generated by its partisan-oriented statutory scheme must fail in light of §2.1-526.8(E). The newly-established insurance plan provides financial coverage for persons who find themselves in just such a predicament as did the Lee County and Scott County electoral board members and registrars. Thus, the decisions of the lower courts are consistent with both the pre- and post-1986 versions of §24.1-32.

CONCLUSION

The lower courts fully considered and rejected the Petitioner's arguments that local election officials are not state employees. Other than merely state that the lower courts were wrong (Brief of Petitioner at 14), Petioner has failed to supply sufficient justification for this Court to depart from the normal course and defer to the agreed-upon determination by the lower courts.[5]

Respectfully submitted,

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and
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[5] Since the validity of the statute is not in question, and this Court is not being asked to decide a constitutional issue, there is no reason to certify any questions to the Supreme Court of Virginia. Further, since the damage claims assessed against the Petitioner have been held to be unenforcable due to the Commonwealth's Eleventh Amendment immunity (A-20-22), the Petition should be denied as moot.